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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,
vs.
FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,
PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATON,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for Pacific Maritime Association, Intervenor

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QUESTIONS PRESENTED

The Section 15 Question.

Where most of the members of a maritime collective bargaining association of employers are parties subject to the Shipping Act; and where the association, under a collective bargaining agreement, makes a specific cash commitment to the union in exchange for a promise of more pro-

ductive labor performance; and where the members of the association develop an assessment formula to fund the cash commitment; and where there is no undertaking or understanding of any member of the association to establish rates which either pass on or absorb the assessment; and where there is no undertaking or understanding of any member to establish rates which either pass on or retain the benefits of increased productivity—does such collective conduct result in the type or character of arrangement which must be submitted to the Federal Maritime Commission for approval under Section 15 of the Shipping Act as a condition precedent to its validity?

The Sections 16 and 17 Question.

Is there evidentiary support for the findings below that the formula devised by the Pacific Maritime Association for funding its obligation under the Mechanization Agreement was *not* a special formula for computation of the mechanization assessment on the handling of automobiles and *did not* cause undue or unreasonable prejudice or disadvantage to Volkswagen in violation of Section 16 or result in an unjust or unreasonable practice in violation of Section 17?

STATEMENT OF THE CASE

1. The Parties.

Pacific Maritime Association (PMA), intervenor, is an association whose members are water carriers, marine terminal operators, and stevedore contractors. These members comprise the Pacific Coast shipping industry. PMA is one of the largest employer collective bargaining associations. It maintains offices at major Pacific Coast ports. It administers and implements contracts negotiated with eight unions, of which the International Longshoremen's and

Warehousemen's Union (ILWU) is one.[1] It maintains central pay offices and cooperates in the operation of maritime hiring halls. PMA agreements with maritime unions provide for annual payrolls of several hundred millions of dollars. Its staff administers fringe-benefit programs that have accumulated trust funds in excess of a hundred million dollars. (R. 612a; 616a; 667a; 179a-183a.) It is *not* a rate-making body or conference. (R. 617a; 179a.)

Marine Terminals Corporation and Marine Terminals Corporation of Los Angeles (MTC), referred to in the Examiner's and Commission's decisions as "respondents", are stevedore contractors serving both common carriers and private carriers. They have performed services for Volkswagen since 1954. They are members of PMA. (R. 614a; 615a; 667a.)

Petitioner, the manufacturer of Volkswagen automobiles, imports vehicles through West Coast ports. (R. 669a.)

2. The Volkswagen Shipments.

Approximately 75% of Volkswagen's vehicles move on chartered vessels and the remainder on common carriers. (R. 614a; 669a.)

The stevedores (employers of longshoremen) who discharge Volkswagen's vehicles from vessels of common carriers are employed and paid by the steamship lines. The charges for these stevedore services are not billed separately but are covered by the steamship's freight rates. (R. 629a; 632a; 177a.) Steamship freight rates on automobiles did

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1. ILWU is the certified collective bargaining agent of all longshoremen and marine clerks employed on the Pacific Coast. (R. 181a.) Contrary to the statement in the Solicitor General's brief (p. 4), ILWU does not bargain on behalf of seagoing, "offshore," personnel. (R. 98a.) This personnel is represented by seven other unions.

not increase during the period of time relevant to this case. (R. 632a-633a; 177a.)

The stevedores who discharge Volkswagens from vessels chartered to Volkswagen under its FIO ("free-in-and-out") charters are employed and paid by Volkswagen under private contracts. These are the only stevedoring charges which Volkswagen pays directly. The contracts negotiated by Volkswagen with MTC provide for a commodity rate that includes the cost of labor, taxes, insurance, overhead and profit. (R. 621a; 154a; 160a; 764-765.) This commodity rate is negotiated annually on an analysis of costs incurred since the previous review; it is, in effect, a cost-plus rate. (R. 621a; 155a; 764-765.) Upon renegotiation of the commodity rate charged to Volkswagen after inauguration of the plan, the rate to Volkswagen per vehicle for MTC stevedore services was less than the charge made prior to 1961. (R. 627a.)[2]

This litigation developed from the refusal of Volkswagen to pay the stevedore charges as submitted by MTC. Volkswagen insisted that it was entitled to deduct an amount equal to the labor cost incurred by MTC under the ILWU-PMA Mechanization Plan. (R. 627a.) Volkswagen asserts that this labor cost was unfair, arbitrary and unlawful under the Shipping Act.[3]

3. Establishment of the Mechanization Plan and Its Implementation.

In the Fall of 1960, PMA and ILWU agreed to a program to foster modern and efficient cargo handling. ILWU had saddled the longshore industry with baroque work

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2. This statement deliberately contradicts the brief of the Solicitor General. The discrepancy is discussed herein at pp. 15-20, *infra*.

3. In the District Court, Volkswagen also asserts violations of the Sherman Act, which charges, on Volkswagen's request, have been stayed pending determination of the Shipping Act questions.

practices designed in the thirties to make work for unemployed dockworkers but vigilantly elaborated upon for over a generation. Exorbitant labor costs were the result. Efforts to reduce these costs by the introduction of modern vessels and improved cargo gear were blocked by ILWU. Any deviation from the status quo in gang structure and work practices stimulated "hard-timing," slowdowns and strikes. (R. 618a; 668a; 183a-187a; 213a-214a.)

After extended and intensive collective bargaining negotiations commencing in 1957, an Agreement on modernization was reached in 1960. (R. 618a; 668a.) The objective of the employers was to obtain the uncontested right to introduce labor-saving machinery and modern vessels; to determine the number of men who would work on a particular job; to introduce other time-saving procedures; and, generally, to have a free hand in directing loading and unloading operations. (R. *Ibid.;* 203a-205a.) The objective of ILWU was to protect dockworkers who would be replaced by more efficient methods. (R. 618a; 668a.)

The employers accepted the ILWU promise that labor costs would be reduced by increased productivity per man. ILWU accepted the employers' promise to add to labor costs twenty-nine million dollars for the privilege of inaugurating a new approach to operations. (R. 618a-619a; 668a.)

The philosophy underlying this agreement was unique. It marks a signal achievement of the collective bargaining process. It marked a new era in Pacific Coast labor-management relations on the waterfront. At long last the old trend was reversed. For the first time both sides could leave the negotiating table with sound reason to believe that a mutually beneficial agreement had been achieved. (R. 219a-222a; 229a.)

Implementation of the initial ILWU-PMA Memorandum of Understanding was commenced in January 1961, and the formal Agreement was executed in November of that year after novel and troublesome tax problems had been solved. (R. 619a; 221a; 229a.) The Agreement provided that PMA reserved the right to develop the method of collecting contributions for the mechanization fund from those PMA members who are direct employers of dockworkers. (R. 620a; 668a; 284a.)[4] Therefore, PMA appointed a Committee to develop recommendations for allocation of the cost of the plan among such members. (R. 619a; 216a.)

Numerous methods for allocation were proposed and considered. It was soon realized that it was statistically impossible to allocate this new cost in direct proportion to the benefits to be obtained. (R. 467a.)[5] Bereft of precise statistical guidance, the Committee turned to conceptual solutions.[6] The remaining alternatives were assessments based on man-hours or tonnage, or combinations of both. (R. 466a-479a.) The man-hour assessment was rejected

4. At pp. 21-22, *infra*, we demonstrate that this reservation of power does not prevent the funding arrangements from being an integral part of the collectively-bargained mechanization plan.

5. The Committee could not devise a formula that related contributions to savings only because to do so would have been cumbersome and difficult, if not impossible, to administer. The Committee did *not*, as Volkswagen implies at pp. 5-6 of its brief, oppose such a formula on principle.

6. PMA records did not enable its committees to pick out specific cargoes or stevedore operations that were most likely to benefit from the plan. (R. 234a-235a.) The Committee did not, prior to the issuance of its report, make any study of the extent to which stevedores handling automobiles could effect savings as compared with the costs of the plan (i.e., the productivity approach, which the Committee rejected as unworkable in practice). Nor did the Committee examine in detail the costs or savings attributable to the mechanization plan as it applied to any of the other 600-odd commodity operations affected. (R. 95a; 112a-113a; 466a-474a.) The Committee did not specifically discuss automobiles prior to the issuance of its report. (R. 102a; 111a.)

because, contrary to the objective of the plan, an employer would contribute less as his savings due to the plan increased. (R. 468a-474a.) Accordingly, some type of tonnage assessment was indicated.

For many years prior to adoption of the plan, dues assessed to PMA members to defray the substantial cost of operating the association were computed on the basis of tonnage handled. (R. 623a; 668a; 470a.) To assure that all members computed their tonnage dues on the same basis, PMA historically determined tonnage in the same manner as its carrier members determined their revenue. (R. *Ibid.*; 81a; 103a.) The revenue ton is computed on the basis of the cargo's weight (2000 lbs/ton) or measurement (40 cu. feet/ton), whichever is greater.[7]

As a consequence of this well-established system for the collection of PMA tonnage dues, the same system was adopted as a fair and efficient means of allocating the mechanization costs.[8] (R. *Ibid.*) Therefore, the members were directed to report and make their contributions to the plan in the same manner as the tonnage declarations were

7. *Chartering and Shipping Terms,* 3d ed. 1951, pp. 105-106; *Modern Ship Stowage,* U.S. Dept. Commerce, 1942, pp. 141-142. The tonnage of lumber is based on board feet. Tonnage dues on bulk cargo are computed at one-fifth the rate for computation of dues on general cargo. This ratio was also adopted for the mechanization assessment. (R. 470a.)

8. Although a tonnage assessment was initially adopted, the plan was ultimately financed by a combination of tonnage and man-hour assessments: Approximately 12% of the fund is collected on a man-hour basis from employers of marine clerks to cover benefits paid under the plan to their employees whose work is not tied to tonnage handled; 88% is collected from employers of longshoremen on the basis of tonnage handled by them in order to cover the cost to benefits of their employees whose work is tied to tonnage. Volkswagen does not protest the inclusion in the MTC commodity rate of the man-hour labor cost which MTC incurs as an employer of marine clerks. (R. 631a; 669a.) Volkswagen only challenges the tonnage assessments incurred by MTC as a stevedore contractor.

reported for "dues" in 1959, which was selected as the base year prior to imposition of any mechanization assessment. (R. 624a.)

Historically, PMA tonnage dues on the handling of automobiles have been and still are computed and paid on the basis of measurement. (R. 622a n.12; 670a; 80a-81a; 83a; 217a-218a.) In particular, MTC, with the knowledge of Volkswagen, reported and paid on a measurement basis the MTC tonnage dues imposed on its handling of Volkswagen's vehicles; Volkswagen did not protest this method of computing MTC tonnage dues, notwithstanding that Volkswagen knew they were an item within the MTC cost-mix. (R. 621a-622a; 160a-161a; 762; 764-765.)

Thus, the funding formula simply followed well-established past practices. The revenue ton on the carriage of automobiles in the offshore trades (the only movement of automobiles of any consequence) had always been calculated by measurement tons and not by weight tons. (R. 670a; 621a n.11; 218a; 753-754.)

Thus, notwithstanding the misstatements in the Solicitor General's brief (pp. 37, 41), there is no conflict with past practice and no new formula has been evolved. On the contrary, Volkswagen's efforts to obtain a modification of the funding formula by substituting weight tons for measurement tons was itself a proposed departure.

The foregoing description of the manner in which the funding formula was developed emphasizes the fact that PMA members were concerned solely with implementation of the mechanization agreement and were not rate-making. (R. 675a.) In the words of the Examiner: "There is no substantial evidence to show that the actions of either the PMA membership or the Board of Directors or the Committee after January 10, 1961, were intended to do more

than establish a method of assessment of the membership for contributions to the Mech Fund." (R. 637a.)

4. Volkswagen Stevedore Bills.

Prior to implementation of the mechanization plan in January 1961, MTC charged Volkswagen $10.45 per vehicle for its cargo-handling services; its overhead and profit margin was approximately $1.00. (R. 140a-146a.) There is no evidence—hence no finding—as to the specific dollar figure charged petitioner by MTC for stevedoring at any time following implementation of the mechanization plan.[9]

We stress, however, that while the specific cost was not disclosed, the Examiner found:

> "For a while, the charge continued at the old rate. Some time later, a lesser rate was negotiated." (R. 627a.)
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> * * * * * * *
>
> "... *there is no substantial evidence to support Volkswagen's conclusions that PMA imposed 'a non-absorbable charge on this cargo.'*" (R. 637a n.24; emphasis added.)

The testimony of the Vice President of MTC, which was adopted by Volkswagen's Pacific Coast representative, confirms that items of post-plan costs decreased. (R. 143a; 155a; 162a; 767.) MTC had been able to "increase the rate of production of their gang hour." (R. 633a; 143a; 767.)

Matson Navigation Company succeeded in decreasing the costs of handling automobiles from $12.00 to $4.00 per automobile (R. 224a), and Volkswagen's Pacific Coast repre-

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9. Volkswagen at all times knew what it was charged to unload its vehicles. Volkswagen did reveal its pre-plan charges. It never revealed its post-plan charges, although it knew its own as well as MTC's costs. (R. 167a-169a.)

sentative acknowledged that Volkswagen's production per gang hour was "comparable" to Matson's. (R. 171a.)

Substantial savings by reduction of gang size and "dead-time" were achieved. The contribution of these savings to increased productivity were—the Vice President of MTC conceded—attributed to the improved attitude of dock-workers produced by the plan. (R. 157a-159a; 162a; *cf.* 225a-226a.) The interplay of all these factors accounts for the ability of MTC to decrease its commodity rate, while at the same time, a new item of labor cost was assumed. (R. 219a.)

5. The Suit Against MTC and Reference to the Commission.

Following circulation of the Committee's recommendations, Volkswagen induced its stevedore contractors to solicit PMA to compute the mechanization assessment on the handling of automobiles at one-tenth the rate at which PMA dues were then, and are now, computed: Volkswagen urged substitution of a weight ton for the measurement ton in use for years. (R. 628a-629a, n.19; 654a; 218a; 760-761.) The fact that petitioner's automobiles were carried on chartered vessels under lump sum daily charter hire, and were not freighted on any tonnage or unit basis, was offered as excuse for a deviation in favor of Volkswagen. (R. 629a; 511a.)[10] Despite the fact that operational experience under

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10. Volkswagen also represented to PMA that freight on automobiles in offshore trades is determined by unit and that tonnage dues in respect to handling of automobiles are paid variously by unit, weight and measurement. (R. 218a; 511a.) These representations are contrary to fact but have been repeated by petitioner without noting that the findings establish (1) Volkswagen knew MTC tonnage dues on the handling of its vehicles were computed and paid on a measurement basis (R. 621a; 160a-161a); (2) freights are "dependent upon measurement" in the offshore trades regardless of how tariffs are quoted. (R. 621a; 670a.)

the plan had not yet been had, Volkswagen induced its stevedore contractors to seek a modification of the assessment formula that would inure only to Volkswagen's benefit and had no historical basis. (R. 761; 654a; 626a-627a.) PMA denied Volkswagen's requests for a deviation (R. 629a-630a.) PMA was unpersuaded that Volkswagen suffered any hardship,[11] and concluded that Volkswagen's proposal would lead to interminable bickering with employers of dockworkers regarding the impact of the plan upon the handling of hundreds of commodities which cross Pacific Coast docks. (R. 630a.)

A dangerous situation jeopardizing the tax position of all contributing employers was developing because of the MTC refusal to contribute. (R. 518a.) Hence, PMA firmly demanded that all delinquent contributions be paid. MTC thereupon requested cooperation from PMA in a suit against Volkswagen. PMA agreed to assist, but when a conflict of interest between PMA and MTC threatened, PMA withdrew its undertaking to assist. (R. 517a-518a.)[12]

Finally, when its demands did not produce results, PMA sued MTC in the Federal District Court. MTC answered by impleading Volkswagen, who interposed claims of illegality

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11. The Trial Examiner agreed: "Volkswagen's contention that the Mech Fund charge puts VW at a competitive disadvantage in relation to other compact cars is given little weight considering the relationship between the Mech Fund charge of about $2.35 to the selling price of VWs." (R. 654a n.49.)

12. This withdrawal of assistance has been challenged as being a mere cover for a friendly suit. It is asserted that PMA's willingness to assist MTC proves that PMA intended to assess Volkswagen rather than MTC. This view of the evidence has not prevailed below because the facts are just the reverse. PMA at all times has recognized its right and duty to defend its funding formula, but it has consistently taken the position that the obligation of members to contribute to the fund is separate and distinct from any rates or charges which its members may see fit to quote. (R. 219a-220a; 227a-228a.)

under the Shipping Act, 1916, and the Sherman Act. On Volkswagen's request, all court proceedings were stayed pending final determination of the Shipping Act questions by the Commission.

With respect to the issues presented under Section 15 of the Shipping Act, 1916, the Commission held that *if* PMA members had engaged in rate making by requiring the addition of the mechanization assessments to established rates, such an agreement would be within the Act. However, the Commission found that the Record was devoid of any evidence of such an agreement. The Commission, therefore, concluded that the mechanization plan and its assessment formula are not covered by the Act, since they were solely agreements affecting labor-management relations. (R. 675a.)

With respect to whether a violation of Section 16 had occurred, the Commission held that Volkswagen had admitted "that all of the relevant case law requires a showing that competitive cargo has been preferred," and that Volkswagen's cargo had not been "subjected to 'prejudice or disadvantage'" as compared to competitive cargoes; hence, petitioner had failed to establish a Section 16 violation. (R. 676a.)

With respect to the Section 17 issues, the Commission concluded on the basis of established principles,[13] that there is no statutory requirement that the various users of a maritime facility be charged identically "as long as 'substantial benefits' are provided" for the charges assessed. (R. 677a.) The Commission found: Volkswagen secured substantial benefits from the mechanization agreement; the method adopted by PMA for the funding of the mechanization agreement was indicated by sound business judgment and was reasonable, being modeled after the methods for

13. *See, e.g., Evans Cooperage Co. v. Board of Comm'rs,* 6 F.M.B. 415 (1961).

collection of association dues that had been in use for many years without protest. (*Ibid.*)

The Court of Appeals in a careful and detailed opinion (371 F. 2d 747, R. 779-801) affirmed the Commission on all points. In its decision, the Court of Appeals recognized and applied the principles of *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607 (1966).

SUMMARY OF ARGUMENT

Re Section 15.

Agreements between maritime operators which fix the rates the parties must charge to their customers are fairly characterized as rate-making agreements and as such require Section 15 approval. The characteristics of a Section 15 agreement are (1) it is entered into between maritime firms, (2) it fixes rates, or pools revenues, or controls maritime competition, or allots ports, or regulates sailings, etc., and (3) it deals exclusively with ocean transportation. When an agreement may be fairly characterized as a Section 15 type of agreement, it retains that classification even if the rates charged by the parties to the agreement are fair. When an agreement cannot be fairly characterized as a Section 15 agreement, it retains that classification and does not become converted to a Section 15 type of agreement even if the rates charged by the parties to it are unfair. The Shipping Act adequately arms the Commission under Sections 16 and 17 with the power to redress any damage done by unfair maritime rates.

Agreements which are fairly characterized as labor agreements need not be approved under Section 15. The characteristics of a labor agreement are that it provides for wages, hours, conditions of employment and deals with the numerous other issues which arise between employer

and employee. The usual result of a labor agreement is to increase the costs of the employer parties. Increased costs are reflected by increased rates or prices unless (1) the profits are reduced or (2) offsetting savings are obtained. Regardless of whether increased costs generated by labor agreements are absorbed by a reduction of profit, or are offset by savings, or are passed on to the customer, or are accounted for by some combination of these alternatives, the underlying labor agreements do not thereby change their character as such and become rate-making agreements. The Mechanization Agreement and the assessment formula which it requires and incorporates cannot be characterized as anything other than a labor agreement. In fact, it is one of the outstanding collective bargaining achievements of our day. It solves troublesome problems introduced by modernization and automation. Its pioneering principles have received national acclaim. Even our adversaries commend it.

The Shipping Act is designed to regulate ocean transportation. Labor-management problems are controlled by the NLRA and the processes of collective bargaining. To transfer the latter activities to a commission which, although well versed in shipping problems, claims no expertise in the field of labor, would produce tragic results.

If a labor agreement contains some anti-competitive vice comparable to a "cat's paw" agreement, that circumstance does not convert it into a Section 15 agreement. In truth, the fact that it is not a Section 15 agreement actually protects any injured party. Since a non-Section 15 agreement is not entitled to anti-trust immunity, a party aggrieved remains free to assert his anti-trust complaint in the federal courts.

Re the Sections 16 and 17 Issue.

The determinations of the Commission that Volkswagen was not either prejudiced or disadvantaged in violation of Section 16, or subjected to an unreasonable or unjust practice in violation of Section 17, present factual questions peculiarly within ~~the~~ competency of the Commission. The decision of the Court of Appeals, deferring to the Commission in accordance with the principles reiterated in *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966), determined that substantial evidence supports the determinations of the Commission, and, indeed, there is no evidence that a special formula was devised for the assessment on the handling of automobiles.

ARGUMENT

I. THE SECTION 15 ISSUE.

A. The Solicitor General's Factual Misconceptions.

Certainly we do not accuse the Solicitor General of intentional misrepresentation. But with equal certainty we do accuse the Solicitor General of indulging an academic and uninformed inference which ignores and disputes the record.

Briefly stated, the Solicitor General characterizes the mechanization plan and its assessment formula as rate making because: (1) the assessment formula added an item of cost of MTC of $2.35 per automobile; (2) sellers pass costs on to buyers; (3) MTC had a profit margin of only about $1.00 per vehicle and (4) to retain its profit margin MTC had to increase its rate to Volkswagen by $2.35 per vehicle.[14]

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14. The seriousness of the misconception indulged by the Solicitor General is brought into focus by his assertions that MTC "obviously could not absorb a $2.35 mechanization assessment and was compelled to increase the charges to petitioner [Volkswagen]

Thus the Solicitor General argues that the plan and its assessment formula required MTC to add $2.35 per vehicle to its existing charges to Volkswagen and, therefore, was subject to Section 15.

But the facts are different. The fourth point enumerated above could be true only if all other items in the MTC cost mix remained as they were pre-plan. Such did not occur. The item of $2.35 which MTC added to its numerous costs was merely the price it paid to *reduce* other labor costs per unit handled. That is to say: under the plan, MTC (as well as all other PMA members), contracted for a reduction of labor costs per unit of production by eliminating the practice of paying men for doing nothing (featherbedding) and by obtaining the right to use modernized vessels and other mechanical improvements without union interference. Moreover, as these elements of labor costs went down, other items of costs which are based upon wages, such as taxes and insurance, also decreased. Therefore, instead of the inference drawn by the Solicitor General in step (4) above, the more reasonable inference is that the members of PMA added one item of labor cost in order to recoup that amount or more by reduction of other items of labor costs.

But we need not rely upon inference. The record is clear. The facts are:

(a) The $2.35 per vehicle was added to the MTC cost mix, but our adversaries did not disclose the *reductions* in the MTC cost mix. They did prove that the pre-plan rate per

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by that amount." (Emphasis added). (p. 37.) It is not difficult to jump to the erroneous conclusion that an increase in one cost to a cost-plus operation must result in an increase in price. In our brief opposing Volkswagen's petition, when preoccupied with the issues pertinent only to Certiorari, we made the same error. Upon discovering that the Solicitor did not agree that the point is immaterial, our factual error was promptly corrected in our Brief in Answer to Memorandum for the United States.

vehicle was $10.45 but they did not disclose the amount of the post-plan rate per vehicle. That evidence could readily have been produced by Volkswagen who assuredly knows its own costs. Volkswagen rested with proof of one item on the debit side of the cost ledger but completely ignored the credits.[15]

(b) Volkswagen's stevedores, following the implementation of the plan, enjoyed increases in their productivity, thus permitting a decrease in commodity rates. (R. 127a; 143a; 155a; 162a; 767.)[16] The evidence is not clear as to whether the post-plan commodity rates included the mechanization assessment ($2.35), or whether such amount was billed by MTC as a separate charge at Volkswagen's insistence. If the assessment was included, as the Examiner believed to be the case (R. 627a), then Volkswagen's total post-plan cost per vehicle was lower than $10.45 by some indeterminate amount. If it was not included in the rate, then it is now impossible to determine whether Volkswagen's total post-plan cost per vehicle was higher or lower than the pre-plan cost of $10.45, but it was certainly lower than $10.45 plus $2.35.[17]

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15. When this area was explored at the hearing, MTC blocked full disclosure claiming business secrecy. (R. 141a-143a.) But, it subsequently developed that Volkswagen's files contained all the pertinent data and it was, therefore, Volkswagen's calculated risk to rely upon inference in lieu of proof. (R. 167a-168a.)

16. The Commission's statement, (R. 670a), that the assessment resulted in a 25% increase in the cost of Volkswagen's unloading expenses is not to the contrary. The amount of the assessment ($2.35) was obviously 25% of Volkswagen's pre-plan cost of $10.45. The Commission could hardly have intended to hold that the assessment was any percentage of Volkswagen's post-plan cost, when this cost had not been disclosed.

17. Of course, even if the mechanization assessment had been added to the pre-plan charges, such fact would only be some evidence of rate fixing by PMA. On the other hand, the fact that this was not done is powerful if not conclusive evidence that rate fixing was not involved.

But, a mere increase in the cost of discharging does not indicate, one way or another, whether price-fixing is involved. Volkswagen's presentation relies heavily upon creating an inference that the cost of discharging its vehicles increased by an amount substantially equivalent to the mechanization assessment, thus suggesting a scheme to fix rates. The Solicitor has been gulled by this argument and, therefore, adopts it. (p. 37.) It simply is not supported by the record.

We emphasize that we do not dispute that the mechanization plan and its assessment does develop one additional element of cost for services to be rendered by the members, and, to the extent stevedore contractors negotiate cost-plus rates with their customers, the added item of costs is included in their calculations.[18] But the plan also purchases economies which promised and achieved substantial decreases in costs, and, to the extent stevedore contractors negotiate cost plus rates with their customers, the reduced items of cost are also included in their calculations. It was this combination of credits and debits to the cost mix which was developed by the plan.

The plan provided the industry with an *opportunity* to operate without ILWU interference. What each operator did with this opportunity would, of course, vary, but the distinction between the action of PMA members within PMA councils and their independent actions as operators must be recognized. (R. 635a n. 22.) Only experience would prove whether a net saving or a net loss would result. The impact

18. Other cost items incurred as a result of participation in the activities of PMA that are also included in such cost-mix are straight time and overtime wages; costs of welfare, pensions, and vacations; PMA membership dues and special assessments. There is no rational basis for withholding supervision by the Commission of the processes by which these costs are established if the assessment formula is covered by Section 15.

on this cost mix would necessarily vary with the many commodities to be handled. Also the experience of each of the many stevedore contractors whose capacities and abilities are not uniform would also develop variations. But, the rates they would negotiate with their customers were entirely their concern and nothing in the mechanization plan and its assessment formula could control those private rates.

Therefore, the inference that the plan and its assessment constituted an agreement to add $2.35, or any other amount per vehicle, to the previous stevedoring rate charged by MTC to Volkswagen is simply contrary to fact.

On the other hand the affirmative findings[19] that such an undertaking did not exist are amply supported by the record. The uncontradicted testimony of Mr. St. Sure, President of PMA, and of Mr. Teige, Chairman of the Funding Committee, discloses that the plan had been adopted to reduce, not to increase, stevedore costs. They pointed out that the funding formula had been adopted without consideration of specific stevedore operations on specific commodities, and that the effect upon the handling of automobiles was not separately considered until after the recommended funding assessment had been developed and questioned at Volkswagen's instigation. (R. 101a; 106a; 120a; 207a-208a; 212a-215a; 231a-232a; 234a-235a.)

The true purpose and effect of the plan was to obtain future cost savings in an indeterminate amount in exchange for costs to be incurred in a specific amount. Thereafter each contracting stevedore (including MTC) was free to work out his own private rates to his customer without interference or dictation from PMA. (R. 126a-128a; 219a-220a.)

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19. R. 637a-639a; 675a-676a; 793-794.

Another serious misconception of fact lies in the assertion that PMA, in using measurement tons for determining assessments, abandoned established practices and adopted a special procedure for the handling of automobiles. The view that a special assessment was devised for the handling of automobiles is contrary to the record.

As set forth in part 3 of our Statement of the Case, PMA employed an *established* practice and rejected *new* approaches when it developed the mechanization assessment. The decision was to levy the assessment in the same manner as "tonnnage dues" had been collected for many years prior to adoption of the mechanization plan. Tonnage dues were collected on revenue tons. Revenue tons are calculated on weight or measurement, whichever is greater. Automobiles in the offshore trade were freighted by the carriers by measurement tons. The previous MTC rates to Volkswagen included PMA dues calculated in this way. This was known to Volkswagen. Volkswagen never protested these practices.

Thus the correct statement of the record is that *Volkswagen* by seeking a mechanization assessment for MTC based on weight tons, was attempting to induce PMA to adopt a *new* practice. This activity is understandable. Shippers continually seek reductions in their costs. But it is seriously inaccurate to urge that the assessment formula was a new approach to assessment of members or was in some manner specially aimed at any shipper.

B. The Fairness of the Charges to Volkswagen.

A considerable portion of the argument presented by our adversaries seeks to spell out some underlying unfairness in the mechanization plan and its assessment formula in its impact upon Volkswagen. This contention is then woven throughout their argument that Section 15 is applicable.

This approach can only be attributed to a misunderstanding of the Section 15 issue because our adversaries surely would not intentionally seek to prejudice this Court by urging immaterial matters.

Whether the particular rate charged to Volkswagen by MTC is fair or unfair may be material to the Section 16 and Section 17 issues of the case, but is not material to whether the mechanization plan and its assessment formula involve an arrangement of the character or type which must obtain Section 15 approval.

If the plan and its assessment formula constitute rate making, Section 15 is applicable even if the MTC rate to Volkswagen is fair. If the plan and its assessment formula do not constitute rate making, Section 15 is not applicable even if the MTC rate to Volkswagen is unfair.

C. The Plan and Its Assessment Formula Are Integral.

It is true that the PMA-ILWU Mechanization Plan and its assessment formula consisted of agreements or contracts or arrangements which involve numerous maritime operators who are themselves parties subject to the Shipping Act. It is also true that the plan and its formula imposed new elements of cost upon the PMA members.

But the formula was an integral part of the labor plan. It is expressly incorporated by reference into the formal plan itself.[20] In fact, it was the employers' performance under the plan. It was the *sine qua non* of the plan. The

20. Article I, Sec. 12 of the mechanization agreement defines the term "plan" to include "arrangements for assessments and charges for Contributions." (R. 283a.)

Article I, Sec. 8 of the plan defines the term "contributions" in part as follows: "Assessments required of Employers who are Member Companies under arrangements adopted by the Association, pursuant to its by-laws, in order to effectuate this Agreement." (R. 282a.)

provisions quoted in footnote 20, when coupled with the obligations created by Article II § 2 (R. 284a), assure the continuance of each contributing employer's obligations under the Agreement, regardless of whether such employer withdraws from the Association.

If it is to be the law that the members of the maritime industry cannot negotiate industry-wide labor contracts which result in new cost items without first obtaining Section 15 approval from the Maritime Commission, this will be the first case to declare such doctrine.

D. Rebuttal of Suggested Constructions of Section 15.

We do not understand that there is a dispute with respect to our contention that labor relations agreements are exempt from Section 15 in view of the following statements contained in the Solicitor General's brief:

> (1) "We agree that the Commission has not been empowered to supervise labor relations in the shipping industry" and (2) "For purposes of deciding this case, we may assume that agreements which relate solely to collective bargaining or labor relations are excepted from the scope of Section 15 of the Shipping Act." (pp. 30-31.)

The qualification in these concessions is the word "solely". We believe that the Solicitor, because of factual misconceptions, was convinced that rate-making was also involved. Our discussions in Sections A-C, above, demonstrate that the factual predicate for the charge of rate-making simply does not exist.

However, the Solicitor, together with Volkswagen, also seems to urge constructions of Section 15 that would invalidate the plan and its formula, irrespective of whether rate-making is involved. We are compelled, therefore, to answer these strained constructions of the statute.

1. The Plan and Its Formula Do Not Constitute a Cooperative Working Arrangement.

Our adversaries argue that the plan and its formula are reached by Section 15 as a "co-operative working arrangement." This term is construed as requiring regulation of "all collective action" of "combinations of maritime firms", including labor bargaining associations. (VW pp. 22-28; S.G. pp. 21-24.)

The Commission rejected such mechanical application of the Act, but insisted that collective undertakings encompassed within Section 15 must involve those activities affecting ocean transportation, which the Act promotes or restrains.[21] Notwithstanding that ocean transportation is dependent upon the services of longshoremen, the Act does not regulate, in any respect, the conditions of employment of maritime workers. Accordingly, the Commission concluded that the Act does not regulate labor-management relations, and, since the plan and its formula did not involve rate-making, held Section 15 inapplicable. The Commission's decision is a sound application of the "familiar rule" that

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21. In such cases as have been concerned with the meaning of the term "cooperative working arrangement" as used in Section 15, the rule of *ejusdem generis* has been applied to determine the content of the phrase, or it has been assumed that it was included in the Act to preclude avoidance of the regulation of the specific practices enumerated in the section by the "manner" in which the prohibited understanding was reached. See, *Unapproved Section 15 Agreements—South African Trade,* 7 F.M.C. 159 (1962); *Unapproved Section 15 Agreement—North Atlantic Spanish Trade,* 7 F.M.C. 337 (1962); *Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co.,* 7 F.M.C. 43 (1962); *Unapproved Section 15 Agreements—West Coast South American Trade,* 7 F.M.C. 22 (1961); *Maatschappij "Zeetransport" N.V. (Orange Line) v. Anchor Line Ltd.,* 6 F.M.B. 199 (1961); *In re Wharfage Charges & Practices at Boston, Mass.,* 2 U.S.M.C. 245 (1940); *American Union Transport v. River Plate & Brazil Conference,* 5 F.M.B. 216 (1957), *aff'd sub. nom. American Union Transport v. United States,* 103 App. D.C. 229, 257 F.2d 607 (1958), *cert. denied,* 358 U.S. 828 (1958); *Associated-Banning Co. v. Matson Nav. Co.,* 5 F.M.B. 432 (1958).

conduct "may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *National Woodwork Mfrs. Ass'n., et al. v. NLRB*, — U.S. —, 35 L.W. 4349, 4351 (1967).

Hence, our adversaries tender various strained and even conflicting constructions of other provisions of Section 15 to give credibility to their mechanical interpretations.[22] It is in this context that they urge the provisions which cover agreements "controlling, regulating, permitting, or destroying competition."

The Solicitor asserts (p. 23) that whenever a shipper *alleges* that it "has been victimized by a monopolistic combination of maritime firms," the maritime firms cannot lawfully act until the Commission has completed a Section 15 hearing. To this impractical construction is added the view that any agreement which *could* present a Sherman Act question should be submitted to the Commission for its "scrutiny in advance of implementation." (p. 24.)[23] The Act has never been so construed.

2. The Shipping Act and The Sherman Act Are Not Coextensive.

The Solicitor General acknowledges that some agreements, which affect competition are not within Section 15

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22. Volkswagen (pp. 28-29) under the provisions pertaining to "fixing or regulating transportation rates" reargues its invalid factual conceptions that the plan and its formula concealed deliberate rate-making. Volkswagen (p. 29) and the Solicitor General (pp. 18, 36-42), albeit for opposing reasons, urge that the provisions concerning "giving . . . special rates. . . or other special privileges or advantages" are being infringed by the plan and its formula. These arguments are rehashes of Section 17 issues which are answered in the text, *infra*, pp. 38-42.

23. Volkswagen's conceptual views are similar to those of the Solicitor General. It asserts that all collective action in the maritime industry is subject to the Commission's scrutiny, and the funding formula, in particular, because "wages always affect prices." (pp. 22-26; 30-31.)

and his citations disclose that the jurisdiction of a regulatory agency must be explicit if, by its exercise, the agency may grant immunity from the antitrust laws. The grant of power to an agency to afford some immunity from the antitrust laws will not be expanded by implication. The policy has been expressed by this court as follows: "Immunity from the antitrust laws is not lightly implied." *California v. F.P.C.,* 369 U.S. 482, 485 (1961); see also *United States v. Philadelphia Nat'l. Bank,* 374 U.S. 321, 348 (1963).

That policy favors a narrow construction of Section 15 and not the expansive one now urged. The construction asserted by the Solicitor would enable the Commission to approve and immunize price-fixing agreements between persons covered by the Act, irrespective of the relationship of the agreements to ocean transportation.

3. Agreements Allocating Fringe Wage Costs Do Not Present Sherman Act Issues.

The Solicitor's view (p. 24) that "an agreement among competitors allocating a shared cost . . . is normally subject to the Sherman Act, since it may have a direct impact . . . on the prices paid by particular customers of the parties to the agreement" is not supportable. The cases cited by the Solicitor involve agreements fixing prices for commodities or services; when an illegal conspiracy exists, the fact that the conspirators shared its costs is irrelevant.

More significantly, the bald principle asserted by the Solicitor cannot be squared with decisions of this Court applying the Sherman Act. A generation ago this Court held that the Sherman Act does not prohibit the elimination of price competition based on differences in wages and other labor costs. *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 502-504 (1940); *see also, United States v. Hutcheson,* 312 U.S. 219 (1941). This Court did not overlook the economic axiom

that "wages always affect prices"; rather, it acknowledged that Congress in 1914 adopted the principle in the Clayton Act that "the labor of a human being is not a commodity or article of commerce,"[24] thus confirming that the prohibitions of the Sherman Act do not cover agreements fixing labor costs, whatever the ultimate effect upon prices.

While the *Apex Hosiery* case did not involve the fixing of labor costs on an industry-wide basis, the principles of the decision are no less applicable. It is a commonplace of American industrial life that industry-wide labor costs are fixed by agreements negotiated between unions and associations of employers. Such associations have been encouraged under the NLRA from the earliest days. As early as 1938 ILWU was certified to bargain with associations of employers of dockworkers.[25] Despite the fact that the activities of such associations have been criticized as frustrating antitrust policies,[26] Congress and this Court have upheld industry-wide bargaining. *NLRB v. Truckdrivers Local 449,* 353 U.S. 87 (1957).

Thus, Congress has left the participants in industry-wide bargaining with "wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solutions of their differences." *NLRB v. Insurance Agents' International,* 361 U.S. 477, 488-490 (1960); *see also, Local 24, et al. v. Oliver,* 358 U.S. 283, 295-296 (1959). Their solutions for featherbedding and automation may involve arrangements where, as on the East Coast, penalty rates are imposed on automated longshore opera-

24. Clayton Act § 17, 15 U.S.C. § 17.

25. *In re Shipowners Ass'n. of the Pacific Coast, et al.,* 7 NLRB 1002 (1938).

26. Compare Senate debate at 93 Cong. Rec. March 10, 1947, p. 1900 with 93 Cong. Rec. May 12, 1947, p. 5144; *see also*, Cox, *Labor and the Antitrust Laws—A Preliminary Analysis,* 104 U. Pa. L. Rev. 252 (1954).

tions (R. 211a) or, as on the West Coast, benefits are guaranteed to workers displaced by modernization and the entire industry participates in paying for the benefits.[27]

In "this era of automation and onrushing technological change" legislation that would curtail "the ability of management and labor voluntarily to negotiate for solutions to these significant and difficult problems would be preceded by extensive Congressional study and debate, and consideration of voluminous economic, scientific, and statistical data." *National Woodwork Mfrs. Ass'n, et al. v. NLRB*, — U.S. at —, 35 L.W. at 4357. Consequently, this Court should reject the retrogressive constructions of the antitrust laws presented by the Solicitor General. To accept them would undermine a signal achievement of the collective bargaining process in finding a solution for automation.

4. The Shipping Act Should Not Be Construed to Conflict with the NLRA.

Our adversaries' views that "all collective action" or "combinations" of maritime firms are subject to supervision of the Commission under Section 15 lead to the conclusion that PMA and like organizations could not be formed until approved by the Commission. Recognizing that such organizations have existed for over a generation without approval, the Solicitor General hesitantly suggests that Commission approval is not required for the formation of a maritime employers' bargaining association. At the same time the Solicitor tentatively suggests that there is a residual jurisdiction under Section 15 for the Commission to supervise the internal operations of an organization like PMA by, for example, protecting the right of a carrier to withdraw from the bargaining unit. (p. 31.)

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27. Other industries also have fringe benefit plans where the benefits are guaranteed and the employers, within their councils, divide up the cost of the industry plan. (R. 215a.)

Such a construction of the Act would impede the effectiveness of PMA as a labor negotiator. Its ability to prevent withdrawal and to compel compliance with contracts which have been ratified is crucial to PMA credibility at the negotiating table. The Solicitor's suggestion would thrust the Commission into the matrix of the collective bargaining process.

Moreover, the Solicitor's construction produces a conflict with the NLRA. The NLRB has exclusive jurisdiction to determine an appropriate bargaining unit[28] and, as its certification of the ILWU in 1938 demonstrates, that unit may be defined in terms of various associations of particular employers. The risk of conflict between the NLRB and the Commission is obvious, if an association of maritime firms could not bargain with a certified union until the association is approved by the Commission. The risk of conflict would be no less, if the Commission could determine who may withdraw from a certified bargaining unit. In either case the Commission would be empowered to undermine the NLRB determination of an appropriate bargaining unit and its certification.

Nor may this Court assume that the Commission will always exercise its power compatibly with the NLRB determination. The Shipping Act does not direct the Commission to promote the policies of the NLRA and it may make its determinations within the narrower limits of the Shipping Act.[29] In any event, this Court has repeatedly limited the

28. 29 U.S.C. § 159.

29. See views of Examiner on this subject, (R. 649a-650a.) Section 401 of the Federal Aviation Act [49 U.S.C. § 1371 (k)], directs the C.A.B. to promote the policies of the Railway Labor Act, which governs labor-management relations of the airlines, thus accounting for the willingness of the C.A.B. to assert jurisdiction in *Airlines Negotiating Conference Agreement*, 8 C.A.B. 354. Such differences between the Aviation Act, on the one hand,

jurisdiction of other tribunals, state and federal, when mere risks of undermining NLRB certifications were threatened.[30]

Furthermore, the Commission cannot be granted the powers, suggested by the Solicitor, without materially circumscribing the right and duty, under the NLRA, of labor and management to resolve industrial problems. The tonnage assessment employed by PMA to fund the Plan is the very device proposed by ILWU, except that it was two cents per ton less than the ILWU proposal. (R. 210a.) The willingness of ILWU to allow PMA to promulgate an assessment formula instead of insisting upon its inclusion *in haec verba* within the Agreement does not alter the economic effect of the assessment.[31] If implementation of the assessment were to depend upon Commission approval, the power of ILWU as well as of PMA to negotiate solutions for industrial problems would be subject to restrictions not imposed in other industries.

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and the Shipping and Interstate Commerce Acts, on the other, may partially explain why the airlines industry does not bargain on an industry-wide basis as do the rail, shipping and trucking industries. *Six Carriers Mutual Aid Pact,* 29 C.A.B. 168, involves an agreement providing for the pooling of revenues and not the sharing of industry-wide labor expenses.

30. *Liner v. Jafco, Inc.,* 375 U.S. 301 (1964); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); *Guss v. Utah Labor Relations Bd.,* 353 U.S. 1 (1957); *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468 (1955); *LaCrosse Telephone Corp. v. WERB,* 336 U.S. 18 (1949); *Inland Empire Dist. Council v. Millis,* 325 U.S. 697 (1945); *NLRB v. Hearst Publications,* 322 U.S. 111 (1944).

31. The undisputed testimony of Mr. St. Sure makes clear that the ILWU willingness was induced by his assurances to Mr. Bridges that the Plan would be funded by tonnage or man-hour assessments or combinations thereof, and that insistence upon an express provision would delay conclusion of an agreement because larger principles were thereby being introduced into their negotiations. Mr. St. Sure having been the author of these assurances to the ILWU did not doubt the continuing interest of ILWU in the funding method developed by PMA. (R. 210a-212a.)

These are not insignificant restrictions. This litigation, which has already consumed five years, demonstrates that implementation of a labor contract could be delayed for years after it was negotiated. The Commission, unlike the Internal Revenue Service and Wage and Hour Administration, cannot give effective interlocutory approval, if the agreement is challenged.

Nor is it any answer to suggest that Commission approval could be sought for mere portions of an agreement.[32] Labor agreements require commitments for all issues solved during negotiating sessions. The commitments are, as the negotiations of the mechanization agreement disclose, interdependent.[33] Hence, Section 9, Article VI of the Agreement provides that if "any portion of the Plan is held unlawful" the obligations of PMA members thereunder will be immediately suspended. (R. 308a.)

Furthermore, a construction of Section 15 that suggests that the negotiation, administration and implementation of labor agreements are within Section 15 would necessitate numerous filings with the Commission. A Section 15 agreement cannot be implemented until it is approved. The potential penalty[34] of one thousand dollars a day per person involved in an unapproved Section 15 agreement assures that maritime firms will proceed cautiously if there is any risk of Section 15 coverage. Thus, virtually every labor agreement, irrespective of whether it is ultimately held to be within the Section, would be filed and would risk fatal delay at the whim of a single objector. Consequently, a public commission would replace the parties

32. The Solicitor General so suggests at pp. 32-33 of his brief.

33. See Mr. St. Sure's description of negotiations. (R. 200a-205a; 230a.)

34. 46 U.S.C. § 814.

to the bargaining process for development of solutions to maritime labor problems.

No provision of the Act, court decision, or legislative history justifies a construction of the Shipping Act that would thus deprive either the employers or employees of the maritime industry of the protection afforded by the NLRA. The Solicitor's fanciful theories concerning legislative intention to curb monopoly power cannot establish that Congress in 1916 placed the Commission athwart industry-wide bargaining processes which were not then within the contemplation of anyone. Even when the Act and its administration by the Commission were reviewed in recent years, no one criticized the Commission for not assuming a supervisory role in maritime labor-management relations.[35]

On the contrary, many years ago Congress manifested a clear intention to afford the maritime industry full participation in the public policies promoted by the NLRA. The severe labor disturbances suffered by the maritime industry in the thirties[36] stimulated Congress to add Title X[37] to the Merchant Marine Act of 1936.[38] Title X created a Maritime Labor Board, whose primary responsibility

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35. Hearings before Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, 86th Cong. 1st Sess. (1959); Hearings before Special Subcommittee on Steamship Conferences of Committee on Merchant Marine and Fisheries, House of Representatives, 86th Cong. 1st Sess. (1959) Steamship Conference Study; Hearings before Merchant Marine and Fisheries Subcommittee of the Committee of Commerce, U.S. Sen., 87th Cong. 1st Sess. on H.R. 6775 Steamship Conferences/Dual Rate Bill (1961); Hearings before Special Subcommittee on Steamship Conferences of the Merchant Marine and Fisheries, House of Representatives, 87th Cong. 1st Sess. on H.R. 4299 (1961).

36. *See, Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).

37. Act of June 23, 1938, ch. 600, §§ 45 *et seq.*, 52 Stat. 965 (repealed).

38. 46 U.S.C. §§ 1101 *et seq.*

was to foster amicable labor-management relations in the shipping industry. Yet, Title X expressly provided that its provisions shall not "in any manner affect or be construed to limit the provisions of the National Labor Relations Act."

The Maritime Labor Board made a thorough study of labor-management relations in the industry and, in 1940, reported to the President and Congress.[39] A chapter of the Report was devoted to the many maritime employers' associations then in existence. The Board did not suggest that the extensive operations of these organizations—all of which affected maritime labor costs and, in turn, had an effect on rates, fares and charges of the industry—in any fashion frustrated the policies of the Shipping Act, 1916. This silence of the Maritime Labor Board cannot rationally be explained as a failure to grasp the economic relationships between wages and prices. The silence is merely another indication that the Board was aware that the regulations of restraints on competition that are covered by the Shipping Act do not encompass agreements resulting from collective activities encouraged and protected by the national labor policies.

5. Sherman Act Remedies Are Not Impaired.

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1965), any doubt as to the self-executing potential of Section 15 was laid at rest. It is now established that failure to file and obtain the Commission's approval under Section 15 precludes antitrust immunity and leaves any damaged party free to pursue his antitrust claims.

Thus Volkswagen's suggestion that there is a risk that anti-competitive conduct may not be subject to effective control, is without merit.

39. Maritime Labor Board. Report to the President and to the Congress (1940).

Volkswagen's second suggestion (p. 42) in this area deplores potential delay if an antitrust action is stayed pending determination by the Commission of whether an agreement has been given Section 15 approval. This apprehension is ill-founded if the Commission's ruling in the instant case is honored, because the Commission has determined that agreements relating to collective bargaining are not within its jurisdiction. The only real risk of dilatory tactics would arise if our adversaries' contentions were adopted because, in such case, potential conflicts between the NLRA and the Shipping Act would require the Commission (which has no particular expertise in labor matters) to give a prior determination as to which act should be deemed dominant.

The Solicitor General takes a different tack. He suggests that the industry may need antitrust immunity for its labor contracts in order to encourage maritime firms to abide by them and, therefore, the Solictor urges that the Commission should have the power under Section 15 to grant such immunity. (pp. 25-26.)

The risk of suits under the Sherman Act has always been known to PMA members. That risk exists whenever collective action of an industry is involved. That risk has not in thirty years dissuaded maritime firms from implementing their industry-wide labor contracts. Here, the Solicitor urges a position inconsistent with the *Carnation* case that "those who drafted the Shipping Act . . . decided not to give the industry complete anti-trust immunity." 338 U.S. at 220. The Solicitor would aggravate administration of labor and antitrust policies by empowering a regulatory agency, whose expertise is limited to rate-making and like trade practices, with authority to determine all questions arising out of collective bargaining which may involve actions prohibited by the antitrust policies of the United States.

Thus, we reach the suggestion that the Commission should have jurisdiction over conspiracies contained in collective bargaining agreements. Volkswagen has asserted the existence of a "cat's paw" conspiracy. The argument is that PMA, with the help of ILWU, has compelled Volkswagen, as an outsider, to contribute to the mechanization fund under a special formula designed to transfer to Volkswagen labor costs which the liner interests of PMA would otherwise have to assume.[40]

The Examiner noted that these contentions were first propounded after the hearing had terminated, but found "no substantial evidence" to support them. (R. 649a, n. 42.) The Examiner refused to determine whether such alleged actions of PMA members were prohibited under the anti-trust laws. (R. 651a.) The court of appeals, recognizing that Volkswagen's theories of a "cat's-paw" conspiracy were not presented by this litigation, carefully preserved petitioner's right to a hearing in the federal courts under the Sherman Act. (R. 801, n. 13.)

Nonetheless, echoes of these theories emanate from the opposing briefs as evidenced by the Solicitor's interjection into this case of *Mine Workers v. Pennington,* 367 U.S. 657 (1965), and *Meat Cutters v. Jewel Tea,* 367 U.S. 676 (1965), which suggests that a "cat's-paw" conspiracy is presented. Doubtless the Solicitor General would agree that the industry is entitled to a trial on these issues before a decision is made and that raising such issues for the first time after the hearing has terminated would not afford fundamental

40. This theory was in addition to the contention, already shown to rest on mistaken facts, that PMA members were rate-making. The "cat's paw" theory is an obvious cover for Volkswagen's failure to obtain quotations of rates from stevedore contractors who are not members of PMA. (R. 173a; 765-766.) Incidentally, the existence of a cat's paw conspiracy is categorically denied.

due process. We protest the implications of theories that would expand the Commission's jurisdiction under Section 15 to cover such conspiracies. Such expansion would lead to serious conflicts between the Commission and federal district courts.

The effectiveness of a "cat's-paw" conspiracy is dependent upon the cooperation of the labor union involved. The Commission does not, and cannot by any twisting of the provisions of the Shipping Act, obtain jurisdiction over maritime unions or their members. Only the federal district court can reach the union. Thus, if the Commission were to acquire primary jurisdiction over the employer "conspirators", piecemeal litigation would necessarily result. Each tribunal proceeding independently could reach opposing conclusions. Such conflicts should not be risked when the Sherman Act already provides the remedy of treble damages to a party damaged by a "cat's-paw" conspiracy.

E. Summary of Section 15 Issues.

Three arguments have been made by our adversaries for application of Section 15 to the Mechanization Plan and its assessment formula.

First: It is argued that PMA and its members were engaged in rate making. This argument is based on the inference that MTC was impelled to add to its former rate the amount of its mechanization assessment because that amount was added to MTC's costs. This has been demonstrated to be a false inference because: (1) such inference is not valid once it is recognized that MTC enjoyed offsetting cost savings attributable to the plan and (2) the actual experience of MTC was otherwise.

There is no substantial evidence to support this inference and the Commission so found.

Second: It is urged that the Mechanization Plan and its assessment formula involve some anti-competitive activity similar to a "cat's paw" agreement. Again no substantial evidence exists to support this suspicion and the findings below are to the contrary. But even if some antitrust violation has occurred, there is no reason to transfer its policing from the Sherman Act to the Shipping Act. Volkswagen's pending suit in the Federal District Court, which has been stayed pending these proceedings, can afford adequate relief if the assertions can be removed from the realm of speculation and brought into the area of proof.

Third: It is also implied that the Shipping Act gives the Commission jurisdiction over maritime labor management affairs. If true the conflict which would develop between the NLRA and the processes of collective bargaining, on the one hand, and the Shipping Act on the other, would lead to hopeless confusion in the industry and would actually end up with *less* remedial aid for damaged parties than is available under existing divisions of administrative, judicial and collective bargaining functions.

It would be ironic to overturn the first agreement which has provided a solution to the crucial problems created by automation and promises peace on the Pacific Coast waterfront.

II. THE COMMISSION'S DETERMINATION OF THE SECTIONS 16 AND 17 ISSUES IS CONCLUSIVE.

It is not clear whether our adversaries consider the rulings below on Sections 16 and 17 as presenting substantial questions, irrespective of whether this Court agrees with their position on Section 15. While we have sought to demonstrate that the fairness or unfairness of the mechanization assessment is immaterial so far as it concerns Section 15, those considerations are material to the Sections 16 and 17 issues.

If the rate charged to Volkswagen resulted in an undue or unreasonable prejudice or disadvantage to it, Section 16 was violated.

If the charges to Volkswagen are founded upon an unjust or unreasonable practice, Section 17 was violated.

There is no doubt that *Consolo v. FMC,* 383 U.S. 607 (1966), requires judicial restraint and deference to the agency's factual determinations. It is also clear that the court's affirmance of the Commission's decisions followed a careful consideration of Volkswagen's complaints.

A. The Section 16 Issue.

Volkswagen conceded at the outset that the Commission has consistently held that Section 16 only prevents discriminations between competitive cargoes. (R. 676a.) The Solicitor General concedes that the ICC applies the same rule for administration of identical provisions of the Interstate Commerce Act. (p. 35) Yet, the Solicitor charges the Commission with "fatally inadequate" analysis and now asserts, with Volkswagen, that a different result is required by *New York Freight F & B Assn. v. Federal Maritime Commission,* 337 F.2d 289 (CA 2d 1964) *cert. den.* 380 U.S. 910 (1965). This very case was cited by Commissioner Patterson (R. 716a.), the sole dissenter on the Sections 16 and 17 issues. It is therefore incorrect to suggest that the Commission failed to consider the applicability of that case when it held the "competitive cargoes" rule to be controlling.

In the *New York Freight Forwarders* case, the practice of freight forwarders to charge different customers random prices of widely-varying amounts for "substantially identical services" was held an infringement of Section 16, regardless of whether competitive cargoes were involved. The controlling point was that charges of widely-varying amounts were made for substantially identical services and

so were "prima facie discriminatory." (*Supra* at p. 299.) Clearly, MTC charges for handling different types of cargoes are not for substantially identical services, and there is no showing that MTC charged different rates for handling automobiles. The services required for handling canned goods, locomotives and automobiles are materially different, and quotations of varying charges is to be expected. The proposed modification of established regulatory practice should be rejected.

B. The Section 17 Issue.

Volkswagen renews evidentiary arguments that have been considered and rejected by the Commission and the court. It reargues that its stevedores did not benefit from the plan commensurate with their costs thereunder, and complains that longshore operations involving bulk cargoes and coastwise lumber were afforded special assessments denied its stevedores. (pp. 55-56.) On the other hand, Volkswagen disregards the finding that its commodity rate decreased and that its stevedores increased productivity as the consequence of benefits attributable to the mechanization plan. As for the lower assessment accorded to bulk cargo operations, Volkswagen ignores that this merely continued the historical industry practice for collection of PMA tonnage dues. (R. 114a.) Finally, the assessment applicable to the handling of coastwise lumber could not affect assessment of other PMA members because the firms principally interested are not members of PMA and their contributions *are additions to* the mechanization fund to be accumulated by PMA members.[41]

41. (Art. I § 2(b), R. 284a; Exh. 1-I, R. 340a-342a.) It is notable that the PMA decision to afford a lower rate to these nonmember employers who requested participation in the Plan is the converse of the action condemned in the *Pennington* case. The PMA action was taken to revitalize a trade that had become marginal. (R. 115a-116a; 185a; 212a; 221a-223a; 232a-233a.)

The Solicitor General, while echoing some of these contentions, stresses that the Commission and the court below should have held that PMA devised a "special formula" unduly burdening the handling of automobiles. The Solicitor's concern is founded on misunderstandings:

First: It is asserted that, as a consequence of expenses incurred under the plan, MTC was required to increase its charges by the amount of its assessment. (p. 37.) We have shown (*supra*, pp. 4, 9-10, 15-20) that no such requirement or compulsion was involved.

Second: It is "stressed" and "emphasized" that the Association devised a special formula applicable only to automobiles (pp. 37, 41); that is to say, PMA acted unreasonably by insisting upon the use of measurement instead of weight and thereby multiplied by ten MTC's cost attributable to the plan. The implicit assumptions are that the base which would produce the lower assessment is always fair, and that the alternative which produces the higher charge is always unfair. (pp. 36-37.)

The Solicitor fails to realize that when choosing between the use of measurement or weight for the computation of *revenue tons*, the base that will render the greater revenue is always selected.[42] Consequently, PMA tonnage dues, being always computed on the same basis as *revenue tons*, will always be higher than would be the case if the alternative tonnage basis for computation were selected. On the Solicitor's argument *every* commodity could complain of the alternative applied to the assessment of its stevedores.

We have shown that the mechanization assessment is computed in all instances in the same fashion as PMA tonnage dues and, in the case of automobiles, the computations of *dues and assessments* are made on the basis of measurement. (*Supra*, pp. 7-8, 20.) We have also shown (*supra*,

42. *Supra*, p. 7, n. 7.

pp. 8, 20) that Volkswagen fully appreciated and did not complain that PMA tonnage dues were historically computed on the basis of measurement. Therefore, when it challenged measurement and proposed weight as a basis for computation of the mechanization assessment, *Volkswagen* was seeking a special formula. Thus, PMA did not multiply a cost item by ten; it was Volkswagen who sought to divide the item by ten.

Surely, the Solicitor General did not intend to misrepresent the record when he asserted that PMA "devised a special formula" for the handling of automobiles. He simply must have misunderstood (1) the findings concerning entries on ship manifests; (2) the differences between freighting practices and computation of charter hire; and (3) the irrelevancy of coastwise and intercoastal freighting practices.

Re (1) above: When the industry refers to a cargo "as manifested" by weight or measurement, it is referring to how freight revenues are computed. (R. 100a.) The ship's manifest, however, may have entries for many other purposes. Thus, entries on the manifest may show weight, measurement, and/or units of a consignment, irrespective of how the cargo is converted into "revenue tons."[43] The Commission properly noted that there is no uniform practice with respect to the entries that may be shown on the manifest (R. 669a-670a), but it did not suggest an absence of uniformity in computing freight for the carriage of automobiles in the offshore trade. To the contrary, the Commission held that in the offshore trades, such freight rates are "dependent upon measurement," even though, for the shipper's convenience, they may be quoted by unit. (R. 670a.)

43. Bross, Ocean Shipping (Cornell Maritime Press, 1956) p. 202.

Re (2) above: In the cases where an entire ship is chartered, freight, as such, is irrelevant. Charter-hire is rental for the vessel and is not dependent upon the volume, weight or units of cargo involved. As Volkswagen's representative confirmed, "no freight [is] shown on the charter ship's manifests," and, since charter-hire is paid in a lump sum, "Volkswagen always manages to put as many cars aboard as they can squeeze in." (R. 165a-166a.) Thus, the Commission found that the entries on the manifests of Volkswagen's chartered ships are not uniform. (R. 670a.) Such entries have no relationship to freight rates or revenue tons.

PMA tonnage dues, however, are computed on the basis of "revenue tons," (R. 217a.) and, the underlying premise upon which dues are assessed is that all "member companies shall pay on exactly the same basis." (R. 81a; 217a-218a.) Thus, whenever tonnage dues are computed on the handling of cargo moving under charter, the dues are determined on the same basis as though the cargo had moved on a common carrier. This assures all members pay dues on the same basis. (R. 111a-112a; 217a-218a.) This practice explains why Volkswagen's stevedores paid their PMA tonnage dues on the basis of measurement without protest. It also explains why the use of measurement tonnage for computation of the mechanization assessments was *not* a "special formula" for the handling of automobiles moving on chartered ships.

Re (3) above: For the purposes of argument, we may concede that all cargoes moving in the intercoastal and coastwise trades, which compete with land carriers, are freighted by weight to permit ready comparison with rail and truck rates. But automobiles *are not carried* in the coastwise or intercoastal trades. Thus, the PMA instructions to its members to report automobiles always on the

basis of measurement had no bearing on a non-existent intercoastal and coastwise traffic. The suggestion that these instructions were intended as a modification of practices applicable to those trades is nothing but an imposition by Volkswagen upon the Solicitor, the Commission, the Court of Appeals, and now this Court.

* * *

The errors which we have noted in connection with Sections 16 and 17, derive from the difficulties of grasping the factual complexities inherent in this type of case. The danger of committing such errors emphasizes the wisdom of the *Consolo* decision. It was a mistake to ask this Court to consider the Sections 16 and 17 issues.

CONCLUSION

The judgment below of the Court of Appeals should be affirmed as to Section 15 and, as to Sections 16 and 17, the Writ of Certiorari should be dismissed as having been improvidently granted.

Respectfully submitted,

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SUPREME COURT, U. S.

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In the Supreme Court of the United States

October Term, 1967

No. 69

Volkswagenwerk Aktiengesellschaft,
Petitioner,

vs.

Federal Maritime Commission and
United States of America,
Respondents,

Pacific Maritime Association and
Marine Terminals Corporaton,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

Brief for Intervenor Marine Terminals Corporation

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No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
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FEDERAL MARITIME COMMISSION and
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PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATON,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

Brief for Intervenor
Marine Terminals Corporation

Intervenor Marine Terminals Corporation ("MTC") submits this brief principally to point out the most egregious errors, fallacies and misconceptions in the brief filed on behalf of the United States. To avoid needless duplication and burden on the Court and the parties, MTC adopts the preliminary material appearing in the brief for Intervenor Pacific Maritime Association ("PMA").

ARGUMENT

In 1960, the West Coast waterfront unions and employers concluded a historic agreement by which, through their own joint effort, they solved the social and economic problems of automation and brought to an end a generation of labor strife. Now, seven years later, the United States in this Court attacks the implementation of this agreement and threatens its continued existence. It does so at the behest of Volkswagen, a German manufacturer of probably the most successful automobile of all times, which complained of the level of assessments on automobiles for the Mechanization and Modernization Fund ("Mech Fund") created by the agreement. It does so in direct contradiction of the position it took before the Court of Appeals. It does so by a brief which rests on wholly unwarranted assumptions and is characterized by pervasive fallacies, misconceptions and contradictions.

That petitioner Volkswagen ("VW") should bend every effort to maximize its profit by minimizing its discharge cost is understandable. MTC itself, to reduce its cost of unloading the cargo of its good customer VW, sought to negotiate a reduction of the assessment on automobiles. All of the arguments in favor of a reduction have been heard, considered and rejected by those in the best position to pass judgment on them—the PMA, the Commission's Examiner, the Commission and the Court of Appeals. For the United States now to reverse the position it took in the Court of Appeals[1] and to seek this Court's intervention on behalf of VW essentially on the basis that the Mech

1. Both the Government's brief below and its brief here were signed by Assistant Attorney General Donald F. Turner on behalf of the Department of Justice. For the Court's convenience, a copy of that brief is attached hereto as Appendix A.

Fund assessment on automobiles was too high is incongruous and, as we will undertake to show briefly below, wholly unwarranted.

I. The Government's Misconception That This Is a Friendly Suit.

Without citing record support, the Government accuses MTC and PMA of collusion to bring a "friendly suit." (Br. 28, fn. 12)[2] The record reflects the contrary. A memorandum of PMA's Coast Steering Committee, issued a few months before the filing of PMA's libel against MTC, states in unmistakable terms that "PMA reserves the right to institute action against Marine Terminals if Marine Terminals is itself still in default of Mechanization Fund Assessments" and that "PMA advises Marine Terminals, and all other companies owing assessments on Volkswagen, that such assessments are due." (R. 518, Ex. 31) There was nothing "friendly" about the position reflected in that memorandum, nor about the libel subsequently filed by PMA against MTC to recover unconditionally the assessments of over $85,000 then accrued and all future assessments.

While the point is irrelevant, it is the kind of inflammatory, misleading and unsupported allegation with which the Government's brief abounds. The impression it seeks to create of VW being "victimized by a monopolistic combination of maritime firms" and as a result having "to yield to the marine terminal companies' demand that it shoulder the burden of the assessment" (Br. 23) is completely false, and the Government's generous use of loaded adjectives does not cure its error. The interests that bind MTC to VW, its prime customer, are at least as powerful as those that bind it to PMA, its collective bargaining

2. The Government's brief is cited as "Br. ....".

association. That is why MTC sought to assume the role of being merely a collection agency (R. 486, Ex. 9), but without success, for PMA sued it in the District Court to collect the assessments, and VW sued it before the Commission for violating the Shipping Act. That this controversy should have arisen in the first place has been most unfortunate for MTC; now to be confronted with the Government's unsubstantiated and irresponsible charges is adding insult to injury.

II. The Government's Fallacious Position Concerning the Applicability of Section 15 of the Shipping Act.

A. THE GOVERNMENT'S FUNDAMENTAL ERROR IN ITS APPROACH TO THE INTERPRETATION OF SECTION 15.

While we do not intend to plow here the ground covered by the briefs of PMA and the Commission, we wish to emphasize the fundamental error in the Government's approach to the interpretation and application of Section 15 which is epitomized by this statement:

> "The burden of persuasion on the question of the applicability of Section 15 would seem to lie with those who would carve out an exception to the broad statutory language, which so clearly covers the type of agreement involved here." (Br. 19)

Whatever else may be said of Section 15, its thrust is to create an exemption under the antitrust laws for approved agreements. *Carnation Co. v. Pacific Conference,* 383 U.S. 213, 216 (1966). This Court has held consistently that such exemptions are to be construed narrowly, not broadly, as the Government contends here. Immunity from the antitrust laws is not lightly implied. *California v. Fed. Power Comm'n.,* 369 U.S. 482, 485 (1962); *U. S. v. Philadelphia Nat. Bank,* 374 U.S. 321, 348 (1963). By advocating a broad construction of Section 15 to achieve its purposes in this

case, the Government is asking the Court to turn its back on a settled policy of construction.

The Government's purpose in pursuing this tack is obscure at best. Secrecy is not an element in this case; petitioner has had no difficulty in spreading all of the facts on the record, and the Commission, moreover, would, without regard to the applicability of Section 15, have the power to compel persons subject to the Act to disclose their charges and transactions and agreements pertaining to their business. 46 U.S.C. Sec. 820. Protection of petitioner's interests is not an element either. If, as respondent and intervenors maintain, the agreement is outside the scope of Section 15, the protection of the antitrust laws remains fully available to petitioner. See, *United States v. Borden Co.,* 308 U.S. 188, 200 (1939).

B. THE GOVERNMENT'S MISLEADING QUANTITATIVE ATTACK ON THE ASSESSMENT.

While the Government at the outset professes that "the Section 15 question in this case is not whether the assessment agreement should have been approved or disapproved, but whether the agreement—good or bad—is unenforceable because it has not been filed with the Commission" (Br. 17), the balance of its brief is largely devoted to a quantitative attack on the agreement (i.e., on the *level* of the assessment payable by members with respect to automobiles). Thus it says, inter alia, that

> "Foreign automobiles were assessed much more heavily than other forms of cargo. . . ." (Br. 2)
>
> "The assessment on foreign automobiles (principally Volkswagens) was so high . . . that the stevedore contractors . . . were unable to absorb it. . . ." (Br. 14)
>
> "It burdens one class of cargo—automobiles—far more heavily than any other. . . ." (Br. 15)

The quantitative attack culminates in the totally inconsistent plea that

> "[u]nless the agreement is declared unlawful, petitioner will have to yield to the marine terminal companies' demand that it shoulder the burden of the assessment. . . ." (Br. 23)

It should go without saying that the level of the assessments is irrelevant to the determination whether or not they constitute a Section 15 agreement.

Nevertheless, the Government appears to contend that because the relative size of the assessment allegedly made it necessary to "pass it back to the shipper" (Br. 27), an agreement to do so comes into existence ipso facto and brings Section 15 into play. Its present position is diametrically opposed to that taken in its brief in the Court of Appeals where it accepted the Commission's finding that there was no agreement on whether to absorb or pass on the assessment (p. 20) and went on to say that "[t]he fact that [MTC] is passing them on to petitioner is a decision that it has reached by itself." (p. 24) Its present position, moreover, is economic nonsense and is refuted by the record and the findings below.

By definition any business operating at a profit passes its costs on to its customers. The effect is the same whether PMA agrees on increased wage rates for longshoremen or on contributions to the Mech Fund. Ultimately, these elements go into the cost mix along with all other costs, and the customer must pay them. (Cf. Br. 27 fn. 11) Surely the Court is not going to draw the line defining the reach of Section 15 by comparing the cost increase with the stevedore's profit margin!

Moreover, the Government's argument flies into the face of the Commission's finding that there was no agreement

among PMA's members to pass on the Mech Fund assessment. (R. 675-676; see also R. 638-639) Before the Court of Appeals the Government urged that the passing on of the assessment to VW was "a decision that [MTC] has reached by itself" (p. 24) and that there was substantial evidence to support the Commission's determination of this factual issue (p. 20), and the Court so held. For this Court now to accept the Government's new contention (made without any attempt to marshal record support) would be to make a farce of the Court's decision in *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966).

The Government's argument is based on the assumption that the assessment agreement had a "direct and substantial impact on shippers" because "[a]s all concerned well knew, the terminal companies had to pass it back to the shipper in the form of a higher charge." (Br. 27) To begin with, the argument is a non sequitur. VW in the context of this case is not a shipper but a purchaser of stevedore services. Its position here is that of a person chartering vessels and arranging to have them unloaded. So far as the record discloses, the transportation rates to shippers, including VW, which cover also the unloading of cargo, did not increase after the assessment went into effect. (R. 175, 177)

Moreover, the Government's assumption is not supported by the record—there is no evidence that the *total* cost to discharge automobiles increased, and VW's failure to produce evidence to that effect is eloquent proof of the contrary.

Finally, the Government in making the argument is less than candid, for the record states (and the Examiner found) that after the assessment against MTC went into effect, the contract rate which MTC charged VW was renegotiated and *decreased.* (R. 155) As of the time of the

hearing in April, 1963, VW was "enjoying a lower rate than they were in 1961." (R. 162, 627)[3]

As we have said, the amount of the assessment is irrelevant to the Section 15 issue, but if it is to be considered in this case at this stage, it must be considered along with the total cost of discharging VW's automobiles. The decline in the rate charged VW by MTC after the Mech Fund came into being strongly suggests that its implementation achieved its purpose of lowering the cost of discharging cargo. And that VW's over-all cost of discharging its vessels on the West Coast declined after 1960 can safely be presumed, for had it been otherwise, VW would certainly have produced evidence to prove it. That in the face of this record the Government can characterize the Mech Fund assessment as a "perfect example" of how "[a] shipper may be harmed by an agreement among the firms with whom he does business" (Br. 27),[4] bespeaks an attitude of total indifference to the true situation reflected by the record.

III. The Government's Fallacious Positions Concerning Sections 16 and 17.

A. MTC HAS NOT BEEN FOUND TO BE SUBJECT TO THE SHIPPING ACT FOR PURPOSES OF THIS CASE.

Petitioner contends that the "disproportionate assessment which the [assessment] agreement imposes on automobiles violates Sections 16 and 17" and the Government agrees that a "strong case of unreasonableness is thus made out." (Br. 34, 42) Both the Government and petitioner

3. The Government's assertion that the cost of unloading VW's was increased by over 20 percent (Br. 7, 37) is based on a self-serving letter written by VW's agent in November, 1961, *predicting* such an increase. (R. 511-512, Ex. 26) Neither the Government nor that letter take into account the subsequent *reductions* in the contract rate negotiated between MTC and VW.

4. The published industry statistics, reflected in Appendix B, show that there hardly is occasion for concern.

completely ignore the threshold question whether these sections, by their terms, apply here. The Government simply assumes MTC to be a person subject to the Act. (Br. 18)

The charges which VW pays, it pays to MTC, not PMA. Thus the relevant relationship which affects VW is only the relationship between VW and MTC. This was explained clearly by the Examiner whose statement was quoted with approval by the Government in its brief below:

> "The Examiner recognized the necessity for focusing only on the relationship between petitioner and MTC:
>
> 'As stated above, neither PMA nor the agreement between and among PMA members has been found subject to the Act. For that reason we do not comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA or the aims and purposes of that agreement. Volkswagen is complaining about Respondents practice of including the Mech fund assessment in its stevedoring rate. *This discussion concerning Section 17, therefore, deals with the relationship between Respondents/ MTC/ and Volkswagen.* (I.D. 35, *emphasis supplied*)'." (pp. 24-25)

Section 16 makes it unlawful for "any common carrier by water, or other person subject to this Act" to subject any person or description of traffic to undue or unreasonable prejudice. Section 17 requires "every such carrier and every other person subject to this act" to establish just and reasonable regulations and practices.

What this case involves are the charges by MTC against VW for discharging automobiles from VW's chartered vessels. Those charges are based entirely on private contract voluntarily negotiated by these parties. (R. 139, 155) They have never been published, filed or in any other respect subject to regulation or supervision by the Commission.

So far as the transactions between VW and MTC are concerned, MTC, which clearly is not a common carrier, is not an "other person subject to the Act." Section 1 of the Act defines such "other person" to be one "carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal *facilities* in connection *with a common carrier by water.*" (emphasis added)

Whatever other activities MTC may engage in in other connections, this case and this record relate to its furnishing of stevedore service pursuant to *private contract* in discharging cargo for VW from VW's *chartered* vessels.

For this reason MTC, from the beginning of this litigation, has maintained that the transactions involved here are not subject to the Act and for this reason alone are not subject to attack. While the Examiner found MTC to be a person subject to the Act (R. 641-642, 672), the Commission refused to do so and simply "assumed", without deciding, that MTC was subject to the Act for purposes of the decision. (R. 673)

The threshold jurisdictional issue, properly passed by the Commission because its other rulings were dispositive, has therefore not been decided. It is obviously the kind of mixed question which, if it needed to be decided, ought in the first instance to be decided by the agency responsible for the administration and enforcement of the statute, not this Court.

B. SECTION 16.

The Government now says, contrary to the settled law under both the Shipping Act and the Interstate Commerce Act, and contrary to its position in the Court of Appeals, that no competitive relationship is necessary to establish discrimination under Section 16. The position is a complete reversal of its position before the Court of Appeals.

It now purports to rely on *New York Foreign Frgt. F. & B. Ass'n v. Federal Maritime Com'n.,* 337 F.2d 289 (2nd Cir. 1964) *cert. den.* 380 U.S. 914 (1965), which it distinguished in its brief in the Court of Appeals on the ground that

> "[i]n the instant case, the assessments bear a direct relationship to the type of cargo carried or handled, and thus a competitive relationship must be shown. Both the Examiner and the Commission, we submit, correctly found no violation of Section 16." (p. 23)

What the Government said in the Court of Appeals is still true. Section 16 is aimed at discriminatory treatment levied against persons standing in a competitive relationship. Where all persons standing in such a relationship are accorded the same treatment, the vehicle for attacking that treatment is Section 17. Inasmuch as Section 17 provides a remedy, there is no reason to give Section 16 a tortured and unwarranted interpretation.

C. SECTION 17.

The Government's argument seems to be pitched on the theory that it was unreasonable for PMA to assess automobiles on a measurement, rather than weight basis, because it results in a "charge" that causes "disparate treatment" and is "grossly disproportionate", "seemingly arbitrary" and "very substantial". (Br. 36, 37, 40)

One obvious difficulty is that, as the Government pointed out in its brief to the Court of Appeals,

> "[i]n the context of the allegation of a section 17 violation, it must be kept in mind that petitioner is charging MTC and not PMA with the violation. And, it is PMA's membership that made the decision as to how the assessments for the fund were to be made, and more particularly, that assessments on auto-

mobiles were to be made on the basis of 'measurement ton.' Therefore, MTC is paying assessments to PMA as PMA's membership has directed. The fact that it is passing them on to petitioner is a decision that is [sic] has reached by itself. The Commission recognized that MTC's activities were reasonable because 'they have sought to change the method of 'Mech' fund assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest.'"

* * * * * * *

"Respondents submit that this is an area where the expertise of the agency is entitled to its greatest weight. Both the Commission and the Examiner examined all the pertinent facts and found that MTC's conduct did not violate section 17." (pp. 24, 25)

The Government now ignores completely these compelling grounds on which it urged the Court of Appeals to affirm.

Another obvious difficulty is that the record does not disclose the level of the *charge* which the Government considers excessive and unreasonable. As pointed out above (pp. 5-8), the charge to VW is its *total* cost of unloading an automobile, i.e., the commodity contract rate negotiated between VW and MTC, and the portion attributable to MTC's Mech Fund assessment is but one of a number of elements going into the cost mix. If, as may be presumed in view of the evidence and VW's failure to produce evidence to the contrary, the total cost to VW actually declined (or did not increase over the amount by which wage rates and other costs increased), the bottom falls out of the Government's Section 17 argument.

If there were really a basis for the Government's charge that automobiles were given "grossly disproportionate"

and "arbitrary" treatment, one might have expected the petitioner below to produce evidence of its unloading costs, how they compared with those paid by other cargo and how they were affected after the assessments become effective. No such evidence was offered, and the failure to have done so strikes at the heart of petitioner's and the Government's arguments here. (See p. 8, fn. 3, above)

Even if the level of assessments on automobiles were relevant, the Government's argument is fatally defective. It is defective, first, because it is based on gross misconceptions, e.g., that VW is "the only shipper compelled to contribute to the [Mech] fund." (Br. 41) VW is not involved here as a shipper but as one who has chartered vessels and contracts for stevedoring of those vessels. Any other manufacturer, owner or shipper would be in the same position if it chartered vessels and contracted for stevedoring. In fact, the United States Army, another major shipper of automobiles as well as containers contracting for its own stevedore services, accepted the assessments. (R. 105-106, 108-109, 121) Neither VW nor the Army nor anyone else is compelled to contribute to the fund. They pay their chosen stevedore contractor to discharge their cargo and that payment may be expected to cover that contractor's costs and profit.

The argument is defective further because it asks the Court to second-guess the Commission's expert judgment as to reasonableness, and if *Consolo* has any meaning, this contention will not lie here.

Finally, it is defective because it is bottomed on relative terms which lack any comparative bench marks. One is reminded of the answer given by Abraham Lincoln who, when asked how long a man's legs should be, said, "Long enough to reach the floor."

That the amount of the assessment was in excess of MTC's then profit does not establish its unreasonableness. (Br. 37) Nor is unreasonableness established by comparison to the "average increase for packaged general cargo"—all that this proves is that VW has been enjoying extremely low stevedoring costs, i.e., less than one tenth of the average cost per revenue ton of general cargo. (Br. 36-37, R. 482, Ex. 7) VW automobiles are widely advertised in current newspapers and periodicals as selling for something under $2,000. The assessment (assuming it is added on to all other costs and, contrary to the record facts, results in no offsetting benefits and savings) represents slightly over 0.1 percent of the value of a car. The silence of the record respecting any consequent injury to VW speaks eloquently in this connection. How then can the Government say ex cathedra that such a charge "[o]n its face . . . [is] grossly disproportionate and excessive" (Br. 37) and that the judgment of all those who have heretofore considered the matter must be rejected by the Court?

MTC, of course, sought a reduction of the assessment in the interest of reducing the cost of stevedoring the cargo of one of its major customers. This appeal was rejected, and the decision to maintain the level of the automobile assessment has now been upheld by the Examiner, the Commission and the Court of Appeals.

The fact that arguments can be made on both sides does not justify the position taken by the Government here. Considering the situation as a whole—the benefits which have accrued and will continue to accrue to shippers, labor and the industry—it would be wholly unjustified to second-guess the Commission's determination of reasonableness on the basis of the arguments now advanced and imperil all that has been accomplished to date.

CONCLUSION

For the reasons stated the judgment below should be affirmed.

Dated at San Francisco, California, October 27, 1967.

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